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In the Supreme Court
of the United States

OCTOBER TERM, 1970

No. 587

JOHN M. LUTTRELL,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OCTOBER TERM, 1970

No.

JOHN M. LUTTRELL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on February 17, 1970, and the order denying rehearing entered on May 21, 1970.

OPINIONS BELOW

The Opinion of the visiting District Judge, United States District Court (Oregon) is set forth herein (Appendix A, p. 43). The opinion of the Court of Appeals is reported in 423 F.2d 1197 and set forth herein (Appendix A, 47). The opinion of the Court of Ap-

peals denying the petition for rehearing is unreported, and set forth herein (Appendix A, p. 48).

JURISDICTION

Jurisdiction to review the judgment by Writ of Certiorari is found in 28 U.S.C.A. 1254(1) and 2101, and Rules of this Court 19(b). Original jurisdiction was based on the Jones Act (46 U.S.C. 688).

STATUTES INVOLVED

U. S. Constitution Art. 3, Section 2 (herein Appendix, p. 49).

Applicable is the Jones Act (46 U.S.C.A. 688) which incorporates The Federal Employers Liability Act (45 U.S.C.A. 51 et seq.) providing benefits to seamen of all statutes relating to railway employees (herein Appendix, pp. 51, 52).

Public Law 695 of June 19, 48 (c) 506, 62 Stat. 496. Generally known as Public Vessels Act, 46 U. S. Code, Section 740 (herein Appendix, p. 49).

Also involved are Rules and Regulations for Cargo and Miscellaneous Vessels (46 C.F.R., parts 90 to 98), issued by Commandant United States Coast Guard pursuant to 46 U.S.C.A. 372 (herein Appendix p. 53).

These regulations interpret or apply 46 U.S.C.A., Sections 363, 367, 391, 392, 404, 481 and 526; and 50 U.S.C.A. 198.

QUESTIONS PRESENTED FOR REVIEW

1. Can fact-triers conclusionary findings exonerating a shipowner on common law principles, devoid of maritime concepts and adherence to guidelines laid down by this Court be sustained in a Jones Act case brought by seaman sustaining injuries while performing duties aboard ship, alleging unseaworthiness, negligence and violations of safety regulations?

(This decision is violative of: *The Osceola*, 189 U.S. 110; *Calmar SS Corp.* v. *Taylor*, 303 U.S. 525; *Socony Vacuum Oil Co.* v. *Smith*, 305 U.S. 424; *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85; *Mahnich* v. *Southern SS Co.*, 321 U.S. 96; *Kernan* v. *American Dredging Co.*, 355 U.S. 431 and *Salem* v. *U.S.*, 370 U.S. 31.)

Fairly comprised are the following subsidiary questions:

A. Is assumption of risk a legally cognizable defense?

B. Can evidence of unseaworthiness and negligence supported by physical facts be ignored by fact-trier?

C. Isn't proof of failure to comply with safety regulations sufficient for liability to ensue, where violations cause harm?

2. Can an Appellate Court prudently sustain a Jones Act case judgment exonerating a shipowner

where the fact-trier's opinion reveals reliance on misstatements of fact made by a commissioned representative of the Executive Department of Government, and where fact-trier denied seaman substantive rights afforded a ward of admiralty?

Fairly comprised are the following subsidiary questions:

A. Can the fact-trier disregard the role of the Master as Lord of his world, along with his ships' papers as against the vessel?

B. Isn't it judicially imprudent for an appellate court to apply procedural limitations against seaman, where fact-trier has denied seaman substantive rights?

STATEMENT OF THE CASE

On Wednesday morning September 14, 1966, this untrained, untutored, unskilled, unlettered 41-year-old Arkansas native boarded defendant's maritime vessel in Portland, Oregon, Harbor, SS Alfred Victory which was completing rehabilitation at a local shipyard from the mothball fleet to engage in the Vietnam sea lift.

He joined the ship's company several days earlier as Ordinary Seaman coming from Honolulu to seek employment. An entirely new 48-man crew was being employed, except for nicknames, identity of individuals were unknown; accommodations were not available aboard; the shipowner provided per diem for shore accommodations.

Several days earlier; on his initial boarding, he was shown to his bunk on which was stencilled his lifeboat station as No. 3 boat starboard with duties including handling painter, securing plugs. He made himself acquainted with these duties, but otherwise he remained uninstructed. Except for working aboard the previous two days, his only maritime experience was a ten-day voyage from San Francisco to Honolulu as ordinary seaman in 1945. Jobs since then were entirely unrelated to that of mariner.

Except for this limited experience aboard ship he was possessed of a seaman's ignorance. During work aboard, the previous day, a fire and boat drill scheduled for the afternoon under the supervision of the Coast Guard was canceled; and rescheduled for this Wednesday morning, prior to sailing. These drills are statutory when more than 25% of the crew is new (Appendix, p. 56); full crew participating.

Admittedly late on this Wednesday morning, due to transportation difficulties from town to pier, he missed the fire drill; he went to his bunk, donned his heavy life-jacket, which encumbered him and proceeded to the cabin deck where No. 3 lifeboat is stowed in the davits, to enter the boat for the purpose of performing the duties of the "ordinary," in the drill.

He climbed a 43-inch-high, 2-inch-round pipe rail encompassing the cabin deck, to jump the 38 inches at the closest point into the boat where an Able Bodied (designated by Coast Guard as AB) seaman, iden-

tified only as "Joe," was stowing supplies which he was pulling up by hand-line from the boat deck, about 12 feet below. He made the jump, entered the boat, and obtained instructions from "Joe," being his superior in the Maritime hierarchy, to help a seaman on the deck below with the hand-lining up of the lifeboat supplies.

He departed the boat, by "perching" himself on the 2-inch-wide gunwhale, intending to reverse his entrance; something happened. The boat swayed, "Anything you want to say." Joe was moving around. He missed the cabin deck rail and fell to the boat deck about 12 feet plus below, sustaining a broken right femur which was surgically repaired with a Neufield nail fixation inserted in the neck and head of the femur, and other injuries.

He was hospitalized in three hospitals until April, 1967, when he was placed on out-patient status. He was in a full body spica cast for about six weeks, sustaining severe thrombophlebitis, being split veins, clots from the tight cast. Ancillary aggravations included pneumonia requiring lengthy oxygen tent treatment and stomach and nervous ailments resulting from the injury. He is permanently disabled. Hospital records support the seriousness of his injuries; there was no contest over the extent of the injuries.

Physical evidence (Ex. 22 herein, App. p. 57) photographically reveals the disregard of "suitable access" to the lifeboat (CG regulation 94.15-10 (b) (2), App. p. 54). A greased lifeboat winch cable extends

parallel to the cabin deck, outboard about 12 inches. Except for this greased cable, there is nothing but air down to the boat deck below, or above. There are no handholds or any safety devices.

The log entry (Ex. 21) reveals the injury occurring at 0852 hours, and boat drill secure at 0912 hours; also, reveals the pilot aboard on the bridge, and the harbor tug alongside for imminent departure; all while Commander Ronneberg, USCG was on the port side of the bridge deck attending to his official supervision of the drills. Ample testimony attests to the fact No. 3 boat was being provisioned during the drill from seaman Wulzan on the boat deck (R. 42) and Chief Officer, Captain Peterson, defendant's witness, "It was not normal procedure to be stowing a lifeboat with supplies during a boat drill" (Tr. p. 176).

Hence, three important activities were going on at the same time: (1) boat drills, a requirement (CG 97.15-35, herein App. p. 56), (2) provisioning the lifeboat (CG 94.20-5(b) herein, App., p. 54) and (3) getting underway procedures. All of which dissipated personnel, their attention and supervision.

The vessel left within the hour of the injury, while Luttrell was being hospitalized.

The injury was logged by the Master; he prepared and filed his Coast Guard Injury Report (Ex. 7, herein App., pp. 58, 59) in accordance with requirements (CG 91.30-1(a), herein, App., p. 53) and filed this re-

port in the office of Commander Ronneberg. He filed a similar report (Ex. 13) with the offshore husband.

Over the Master's signature, these reports specifically reveal Luttrell as being "on watch," "working," "securing No. 3 boat during boat drill."

On the specifics of the injury, he was "securing painter and clearing gripping-in wires" (Ex. 7, herein, App. p. 58, 59); under the supervision of 2d Mate Sleek, revealed as the only witness.

Luttrell's version varied from that of the Master only to the extent that he was not securing painter and clearing gripes. He was performing duties in connection with the drill by departing the boat to help with the stowing of supplies, pursuant to Joe's instructions.

The absence of witnesses, except for Sleek and seaman Wulzan, who both testified by stipulations of questionable value in the light of later discoveries, necessitated reliance on the documentary declarations of the Master and Capt. Peterson.

Captain Hazelwood, an expert master mariner and former marine superintendent of private companies operating government Victory vessels, testified for petitioner. He revealed that the access to the lifeboat on the cabin deck of a Victory Vessel was a long-known hazard and the government would do nothing about it. That the hazard could be eliminated by cutting the cabin deck rail and extending a platform to the side of the boat, some private companies had done that.

He revealed an uninstructed, ordinary seaman would not know the intricate maneuvers of getting in and out of the lifeboat, and that the extension would not hamper the lifeboat operations.

Luttrell was his own witness.

Prior to trial the defendants' witnesses including their leading admiralty counsel, conducted a secret, out of court, unauthorized demonstration on a sister Victory vessel for the purpose of gaining trial evidence. This resulted in their testimony that the accident could not have occurred, although their Chief Officer was not in agreement.

Captain Peterson, Chief Officer on the Alfred Victory vessel, participated in this rigged demonstration and was the Drill Overseer at the time of the injury.

He revealed from the demonstration that there was movement in the boat, when the gripes (wire cables when properly positioned hold both ends of the boat secure to the davits) were not secured, and this was supported by Captain Hazelwood that movement in the boat by a person moving about or a person preparing to jump out could cause the distance to extend between boat and rail.

Captain Peterson, on cross examination, made the following judicial admissions as a live swearer; he identified his signature along with that of the Master on the Log (Ex. 21), Coast Guard Injury Report (Ex. 7) and Company Injury Report (Ex. 13).

That presumably all hands are at their stations until secure; the drill is held under simulated emergency conditions and it is routine for a seaman to proceed in accordance with his boat duties; it was not normal procedure to be stowing a boat during a drill and an ordinary seaman could obtain instructions from an AB seaman.

He also testiifed that if the gripes were not secured there could be motion. He stated, "Usually the gripes were in position, but could be at the same time we were renewing gripes, working on them at the same time."

He further revealed: There was nothing for a seaman to stand on outside the gunwale of the boat to the railing; no method provided. A person could climb out the bow of the boat, slide down the davit tract—sailors have done that. The midship point is the closest and most used to jump; also he has seen sailors climb down the davit and hang on the greasy fall (alongside the davit).

He explained that he has stepped on the greased winch cable parallel to the cabin deck (for ingress and egress) (Ex. 22, herein, App.. p. 57), but he said, "I don't recommend it."

He didn't know what a safe way would be to go from boat to deck, stating, "There is no prescribed book method," for a seaman to get in and out of the lifeboat under circumstances of this type. He said, "You get in and out the best way you think you can." Seamen perform certain drill duties in the lifeboat at the cabin deck level.

Commander Ronneberg testified, among other things, that privately owned Victories had provided a safer lifeboat access. He directly testified that the "lifeboat weighed about 9,000 pounds" and that the "drill was over."

The shipowner was unable to provide petitioner with requested discovery, namely Portland crew list, station bill (a statutory plan showing duties of all hands during fire and boat drills and emergencies), in lieu of the Alfred Victory station bill, secondary evidence of a station bill from another Victory vessel was admitted (CG 97.13-10, herein App. p. 55); crew list No. 3 lifeboat (CG 97.13-20; 97.14, 97.15-35(b) (App. pp. 55, 56); and particularly the identity of "Joe," the otherwise unidentified AB seaman in the No. 3 boat at the time of the injury.

Christian of the Maritime Commission testified for defendant that privately owned Victories had fabricated platforms by cutting the cabin deck rail and a safe access to the lifeboat with rails was provided.

The shipowner merely admitted the identity of the vessel, the injury, the location, and affirmatively alleged contributory negligence by failing to hold on or step securely.

The Court ruled from the bench (App. p. 43) exonerating the shipowner, basing his holding on common law grounds and primarily on testimony of Commander Ronneberg that the boat weighed 9,000 pounds. (The Court said, "you can't move 9,000 pounds of steel,") and (his testimony "that the drill

was over,") then classified Luttrell as a volunteer. He also relied substantially on the vessel's certificate of inspection and seaworthiness by Commander Ronneberg, although this was not delivered to the shipowner until after the injury (App. pp. 65, 66).

Subsequently, an affidavit from Seaman Cannon was obtained, clearly placing Luttrell in the boat at the time of the drill. The accident occurred at the beginning of the drill and he (Cannon) was on the boat deck and ran up the ladder to assist Luttrell (R. p. 49). The identity of Cannon or his presence at No. 3 boat was not known until after trial. This was brought to the fact-trier's attention, among other things as a basis for a new trial. Post trial motions were denied.

The short per curiam opinion of the Appeals Court (App. p. 47) merely supports the fact-trier but does raise a doubt on the basis of the evidence presented.

Following the Ninth Circuit opinion, counsel learned of the death of Commander Ronneberg by his own hand at Seattle, Washington, during the pendency of the appeal. Thereafter, there was made available by the Coast Guard a copy of Ronneberg's Hull Inspection Book (pertinent extracts set forth in App. p. 60 et seq), being a required chronicle of his daily activities on the Alfred Victory. This clearly reveals in his own handwriting in a document in his custody of an official nature, that Luttrell was injured during the drill (App. p. 61), that Sleek was the supervisor;

all clearly revealing that he made misstatements of fact to the fact-trier which clearly led the fact-trier astray. In addition, it appears that his testimony as to the weight of the life boat was wrong; his chronicle identifies the boat (App. p. 60); the manufacturer revealed that a boat of this description empty weighs 3,325 pounds, and provisioned 4,175 pounds (App. p. 70).

These gross, material and prejudicial misstatements of fact, made by Commander Ronneberg in his sworn testimony in his official capacity was the basis of the fact-trier's opinion, exonerating the shipowner.

The truth revealed in his chronicle and the true weight of the boat from the manufacturer was brought to the attention of the Ninth Circuit on a petition for a rehearing. This was denied (App. p. 48).

The above is a nexus of the probative facts. This case cries out for review.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with Decisions of Other Circuits and This Court in That the Harsh Limiting Doctrines of the Common Law Relied on by the Lower Court are Not Applicable to Seamen Cases.

The fact-trier by seizing on a segmentation of the testimony—later found to be untrue—classified petitioner a volunteer, then treated the issues as

though they were dependent on the same considerations. He made no distinction.

This brings the question, apart from safety regulation violations, was there unseaworthiness and negligence? Failure to consider this, the fact-trier, Court of Appeals sustaining, has in effect established a new doctrine permitting a shipowner to provide unsafe appurtenances, condone negligence and subject seamen to the harshness of common law requirements with impunity.

In the Master's words, he was a member of the ship's company, on watch and working.

That this Court does not recognize common law limitations is evident. A "rule of reason" was adopted in *Panama R. Co. v. Johnson*, 264 U.S. 375, 388, 389, by fitting Jones and FELA together. Then in *The Arizona v. Anelich*, 298 U.S. 110 (1936) and *Beadle v. Spencer*, 298 U.S. 124, defendant's theory, if successful, would have made the assumption of risk doctrine available to Jones Act defendants as long as the vessel was not in statutory violation with respect to appurtenances.

Chief Justice Stone referred to *Panama*, *supra* (Gilmore & Black Law of Admiralty, p. 298) explaining that it could not be supposed that a defense not previously available under maritime law had now been made so by bringing in FELA; hence efforts to place seamen under a common law doctrine not intended by the Jones Act was clearly and unequivo-

cally made crystal clear by this Court. The conclusion is that FELA was to support but not detract, or bring the standards of land based employment to maritime employees under Jones. *Braen* v. *Pfeifer Oil Co.*, 361 U.S. 206, is consistent with this theory.

Justice Black fashioned a maritime rule in *Pope & Talbot* v. *Hawn*, 346 U.S. 406, "the harsh rule of the common law is completely incompatible with modern admiralty policy and practice." Gilmore & Black, supra at page 384 comments, "Since the Court has repeatedly emphasized the humanitarian ground for its decisions in this field since the early 1940s, it seems arguable that the *Hawn* rule is not so much a rule of federal supremacy as a rule that seamen are to have the advantage in any court of whatever rules of law, substantive or procedural, may be the most favorable to them," and at page 253, the authors comment "The Supreme Court has claimed the field of personal injury litigation as its own," referring to seamen.

Chief Justice Stone in *Calmar SS Corp.* v. *Taylor*, 303 U.S. 525 (1938) set the requirements for Jones Act recovery by stating clearly (1) the act covers any seaman (2) suffering injury (3) in the course of his employment. He then interprets that criteria as equivalent to the "in the service of the ship formula" in maintenance and cure cases, whether he is actually on duty or not, he is within the coverage of the Act.

Gilmore and Black, supra, at page 257 comments:

"The seaman may recover from any injury

> suffered without his misconduct during his employment period. The injury need not result from or be in any way related to his shipboard duties, and points to a series of decisions beginning with Calmar, supra."

All that is necessary was that the seaman become incapacitated when subject to the call of duty.

The Court again re-emphasized this doctrine in *Senko* v. *La Crosse Dredging Co.*, 352 U.S. 370, 373, holding that the plain intent of the Jones Act is that so long as what the seaman is doing at the time of the injury is in the course of his employment, he is entitled to his remedy under it.

Therefore in the various expressions of this Court, common law limitations are not cognizable by any courts applying Jones Act doctrines; and in *U. S.* v. *Webb*, 397 U.S. 179, this Court held in a tax case "Control is probably the most important factor under maritime law, just as it is under the tests of land-based employment. It may be true that, in most maritime relationships, the workers enjoy discretion that is unusually broad if measured by land based standards—a discretion dictated by the seafaring nature of the activity," this by Mr. Justice Harlan.

A decision not to correct this intolerable opinion would sanction judicial approval to let the administration be governed not by the aim of the remedial legislation and this Court to safeguard its favored wards; but by a hostile philosophy that permeates the very soul of its interpretation.

This Court should take alarm.

Wilkerson v. *McCarthy*, 336 U.S. 70, 71.

A. Assumption of risk.

This, as a common law doctrine, limiting the effectiveness of remedies available to an injured seaman seeking redress has been discarded to the museum of maritime judicial history. This because of the strong humanitarian doctrines expressed in legislation by the Congress directed specifically to seamen, and the many mandates of this Court protecting its favored wards.

True, many fact-triers with strong common law feelings and backgrounds from time to time attempt a nostalgic return to the common law harshness; but the harshness of past seagoing activity has been discarded in favor of the remedial legislation.

The solicitous concern of a fact-trier for a shipowner must be judicially weighed in the light of the strong mandates of this Court against assumption of risk permeating judicial philosophy where the rights of seamen are involved.

Assumption of risk was put to rest by this Court in *The Arizona* v. *Anelich*, 298 U.S. 100 (1936), infra. It arose again in *Socony Vacuum Oil Co.* v. *Smith*, 305 U.S. 424 (1939) infra, and was not disturbed by this Court. This Court therein emphasized the conditions of seamen's employment and the fostering of protection for the seaman.

It sought to rise again in *Manning* v. *Sea Road* (5 Cir. 1969), 417 F.2d 603 and at the outset the Court pointed out that though Manning knew of the unseaworthy conditions, the doctrine of assumption of risk could not be applied in seamen's cases.

Many monuments of this Court, too numerous to mention, attest to the fact that the doctrine has lost verity, and despite serious efforts on the part of shipowners to breathe life into the deteriorating body, it still remains a body, deteriorating more in the passage of time because of the effective concern of this Court not to give it recognition.

B. Unseaworthiness and negligence.

This Court has enunciated the nature of the warranty of seaworthiness in *Mahnich* v. *Southern SS Co.* (1944), 321 U.S. 96. Mahnich was injured when a rope supported scaffold on which he was working parted. This Court pointed out errors of various Courts of Appeals in confusing negligence and the warranty of seaworthiness. In *Osceola*, 189 U.S. 158, "the exercise of due diligence does not relieve the shipowner of his obligation to the seaman to furnish adequate appliances."

In *Mahnich*, supra, had the appurtenances been adequate, petitioner would not have been injured, and his injury was the proximate cause and immediate consequence of the unseaworthiness. This Court then stated the rule which is so clearly applicable to the instant case and concludes that the shipowner is

under an absolute duty to provide seaworthy appliances "when and where the work is to be done."

In *Mahnich*, the vessel was unseaworthy by reason of the failure to supply a sound rope.

Justice Brown recognized the right of seamen to recover damages for injuries sustained in consequences of unseaworthiness in *The Osceola*, supra, although no recovery could be had for operating negligence.

Previous to *Mahnich*, in *Socony Vacuum Oil Co.* v. *Smith*, 305 U.S. 424 (1939), the shipowner asserted assumption of risk where the seaman was performing a dangerous operation in a dangerous way when there was a safe way known to him. Emphasis by this Court was placed on the ward of admiralty relationship, placing care and responsibility on the shipowner for his safety aboard ship. The seaman must accept the appurtenances of the vessel as provided by the owner. The shipowner must provide seamen with seaworthy appliances when and where the work is to be done, noting the hazardous conditions of maritime employment, and the absolute duty to furnish a seaworthy vessel. Assumption of risk was denied and the vessel held unseaworthy, under the doctrine of liability without fault. The warranty of seaworthiness following the seaman around the vessel where the work is to be done.

The Fifth Circuit in *Cox* v. *Esso Shipping Co.*, 247 F.2d 629, distinguished between unseaworthiness and negligence in a suit brought by a seaman injured

when he fell from a cross-arm. Under the seaworthiness doctrine, the shipowner has a clear duty to furnish reasonably safe appliances; and under the negligence concept, there is only a duty to use due care. The *Cox* holding was: The failure of the ship owner to comply with its heavy obligation to select and furnish seaworthy appliances cannot be thus turned into a fault by the seaman.

In the instant case, the same reasoning is true, the fault is not that of the seaman but that of the shipowner in not providing the proper appurtenances to the vessel or supervision to perform the task at hand, whether it be boat drill, provisioning duties, or any duties.

There is a striking analogy in the instant case to that of *Salem* v. *U. S.* (1962), 370 U.S. 31, where a seaman was injured in going from ladder to crows-nest, requiring him to pivot on one leg and follow with the other foot. There were no devices supplied or intended to facilitate a safe maneuver from ladder to platform. The seaman could grasp a vertical beam for support or a pipe stiffener. Defendant argued the seaman could "simply spread his arms to brace himself against the sides of the tower." This Court held: Vessel was unseaworthy for failure to provide a safe place to work.

At the other end of the spectrum is *Krey* v. *U. S.* (2 Cir. 1941), 123 F.2d 1008. The seaman was awarded damages for injuries sustained while taking a shower aboard ship in port. The unseaworthiness

consisted in the lack of hand rails in the shower room.

In the instant case, evidence reveals there was nothing "provided" or "nothing intended" to safely facilitate a seaman going from boat to cabin deck. Luttrell was probably required to "spread himself" in some questionable manner as the defendants unsuccessfully argued in *Salem*, supra. Emphasis in the instant case is invited to the admission of governmental failures made by the vessel's Chief Officer, supra. "There is no safe way." (See Ex. 22, herein App. 57).

In the "Pandora's Box" situation in the instant case with the vessel undergoing boat drill, provisioning duties and getting under way for sea, the following rule is most expressive; Negligence is unnecessary for shipowners liability to attach for unseaworthiness; but unseaworthiness may be brought about by conduct amounting to negligence. See *Hanks* v. *California Co.* (D.C. La. 1967), 280 F. Supp. 730.

The Ninth Circuit rule regarding negligence is "that negligence is given a liberal rather than technical interpretation." *Matson* v. *Hanson* (9 Cir. 1942), 132 F.2d 487.

In view of the getting under way procedures aboard the Alfred Victory, the following rule is expressive of the Ninth Circuit in *Olsen* v. *States Line* (9 Cir. 1967), 378 F.2d 217: "the owner of a vessel has a clear duty to supervise work of seamen under owners command."

And, specifically directed to preparing for voy-

ages, the owners have a specific duty as ruled by the Ninth Circuit in *Correia* v. *Van Camp Sea Food Co.* (9 Cir. 1952), 248 F.2d 113, "Owners of vessel preparing for voyages are under a duty at all times to see to safety of crew, a breach of such duty is negligence."

The duty to provide a seaworthy ship includes the duty to furnish a safe place to work. Such duty exists whether the unseaworthiness is temporary or otherwise. *Morris* v. *Blue Star Line* (D.C. Or. 1961), 193 F. Supp. 763. As in that case and in the instant case, the record supports the conclusion that the vessel was unseaworthy in many respects. There was no access provided rail to boat, or boat to cabin deck; the gripes were loose, they were being renewed, there was no supervision, the crew was dissipated in various activities, no instruction, so "What does it matter which one or how many of the negligent conditions caused the injury or unseaworthy conditions." See *Johnson* v. *Griffiths SS Co.* (9 Cir), 150 F.2d 487.

Justice Rutledge emphasized the doctrine of liability without fault in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85. A longshoreman was operating a winch aboard ship, a shackle supporting a boom broke, injuring him. The fact-trier found a defective forging caused the break, exonerated the ship owner, but held the manufacturer liable under the theory of liability in *McPherson* v. *Buick Co.*, 229 N.Y. 382. Under this theory the Jones Act did not apply as Sieracki was not a seaman and the ship owner not negligent.

This Court determined that the obligation of seaworthiness extended to longshoremen while working aboard the vessel. The Court was unanimous on the duty of the shipowner to furnish a seaworthy vessel. The character of the duty was absolute.

No one can deny the unseaworthiness of the appurtenance to the Alfred Victory at the cabin deck level to go from deck to lifeboat and return. By no stretch of the imagination is jumping, standing on greasy cables or sliding down davits a safe place to work.

C. Violation of safety regulations.

This brings into play Congressional objectives revealing these regulations are geared directly to the safety of a favored class of men with stringent sanctions imposed for violation.

The Congressional intent is described by this Court in *Rogers* v. *Missouri Pac. R.R. Co.*, 352 U.S. 500, 508-510; *Kernan* v. *American Dredging Co.*, 355 U.S. 431; by the Fifth Circuit in *Davis* v. *Parker-Goodloe Co.* (1962), 302 F.2d 489; *Cox* v. *Esso Shipping Co.*, supra and *Manning* v. *Sea Road* (5 Cir. 1969), 417 F.2d 603.

In *Kernan*, supra, seaman's death was caused by violation of Coast Guard regulation requiring open flame lights be not less than 8 feet above deck.

The blameworthy vessel was in the vicinity of oil refineries, vapor on the water, open flame ignited va-

por, fire resulted, seaman died. The fact-trier denied liability on the theory that violation of the rule did not make the vessel unseaworthy. This because the Coast Guard regulation was intended for navigation purposes only. There was no collision or faulty navigation.

This Court held the violation was the cause of death and liability ensued without regard to negligence under the line of decisions of this Court in actions under FELA based upon violations of either the Safety Appliance Act or the Boiler Inspection Acts.

That line of decisions interpreted clause No. 1 of FELA 45 U.S.C. § 51, 45 U.S.C.A. 51 which imposes liability on the employer "by reason of any defect or insufficiency due to negligence." These cases hold that a defect resulting from a violation of either statute which causes the injury creates liability without regard to negligence, citing *San Antonio & A.P.R. Co.* v. *Wagner*, 241 U.S. 484.

The fact-trier (as in the instant case) denied liability because of his views on the general tort doctrine and at common law the employer was granted effective immunity based on assumption of risk and contributory negligence. This insulation was only enjoyed under the common law.

It was clear that general congressional intent was to provide liberal recovery for injured workers, creating no static remedy. See *Rogers* v. *Missouri*, supra.

The Court then held the Jones Act imposes upon the employer the duty of paying damages when the injury is caused in whole or in part by the employers fault, the fault may consist of a breach of duty or of a statutory duty.

This Court has consistently refused to apply a limiting doctrine in FELA cases. Since the defect or insufficiency of the lighting equipment was a violation of safety acts, although the lamp was for navigation purposes, the resulting fire caused the liability; and "this principle governs and compels a result in favor of the claim."

This principle was applied by this Court in *Davis* v. *Wolfe*, 263 U.S. 239. The Court reviewed the contentions against liability by reference to *Louisville & N.R. Co.* v. *Layton*, 243 U.S. 617 and *Minneapolis & St. L. R. Co.* v. *Gottschall*, 244 U.S. 66 which settled the principle that the employee could recover if failure to comply with the requirements of the Safety Appliance Act is a proximate cause of the harm while in the discharge of a duty, although not engaged in the operation for which the safety appliances were specifically designed to furnish protection.

By applying the mandated reasoning in *Kernan*, supra, it is apparent the failure to provide suitable access (and egress) to the lifeboat for seamen resulted in a failure of recognition of the safety regulations by the ship owner (CG regulation 94.15-10 (b) (2) at Appendix (p. 54).

The reasonable fitness rule of appurtenance and

appliances is inherent in any definition of seaworthiness. *Mitchell* v. *Trawler Racer*, 362 U.S. 539.

The regulations apply because these regulations are directly geared to maritime safety (CG 90.01 et seq. and 97.01 at App. 53, 54). Nor can the employee be guilty of contributory negligence in this respect as violation of maritime safety regulations are analogous to the Safety Appliance Act. See *Neal* v. *Saga Shipping Co.* (C.A. Tex.), 407 F.2d 481, cert. den. 395 U.S. 986.

In *Davis* v. *Parkhill-Goodloe Co.* (5 Cir. 1962), 302 F.2d 489, the uninstructed and untrained seaman lost his life while walking along a narrow pipe line with a 2 to 3 foot space between sections, a hand rail was his sole protection. The Appellate Court emphasized the physical nature and the unusual hazard of the facility, in reversing the fact-trier who had favored the shipowner. The shipowner also violated safety regulations.

The Jones Act should have uniform application throughout the country, unaffected by local or common law rules, and this requirement extends to the type of proof necessary for judgment. This, the mandate of this Court in *Garrett* v. *Moore-McCormack*, 317 U.S. 239. This Court is respectfully requested to exercise its powers and supervisory control over the fact-trier so the present opinion may not be the basis for denying other seamen relief.

2. All Federal Judiciary Acting under a Specific Grant in the Constitution is Endowed with Special and Unique Responsibility to Assure That Those Persons, Seamen, As in the Instant Case, are Not Imposed upon.

The nation, as the ultimate guardian of seamen welfare is as great as the judiciary. This decision works a material prejudice to the special intent of maritime law in relation to all seamen affected. *Davis* v. *Dept. of Labor*, 317 U.S. 249 (1942).

The execution of the great powers vested in the judiciary regarding a select class of people support the intention of Congress to insure so far as human prudence can insure their beneficial execution. This truism by Marshall, J. (*McCulloch* v. *Maryland*, 4 Wheat 407).

Jones Act and FELA are remedial public policy statutes, in the interests of a particular class of persons. This Court has expressed this as a truism in *Socony Vacuum Oil Co.*, supra and *Grand Trunk R.R. Co.* v. *Richardson*, 91 U.S. 454. Hence the rule applicable and to be consistently followed throughout the country is that it is to be liberally construed to accomplish beneficent purposes.

This is not a "Heads I win, tails you lose" rule of law. Doubts are to be resolved in favor of the seaman and this is consistent with congressional mandates, and long standing expressions of this Court. See *Warren* v. *U. S.*, 340 U.S. 523 and *Vaughan* v. *Atkinson*, 369 U.S. 527.

The Ninth Circuit opinion denying relief indicated a doubt existed based upon the evidence presented to the fact-trier (App. p. 47) and when the petition for rehearing was submitted that Court had in its possession not only the trial evidence revealing the inability of the ship owner to supply discovery, but also had recently revealed documentation seriously questioning the credibility of the primary witness (Ronneberg) on whom the fact-trier substantially relied, exonerating the ship owner (App. pp. 60, 61).

Under these circumstances, whether by rule or otherwise, the insulation surrounding a fact-trier's opinion should fail. The ship owner by denying their own records, and placing the onus on the seaman, then placed the ship owner in a position of being callous and indifferent to the substantive rights of the seaman.

This thesis is consistent with the mandate of this Court in *Vaughan*, supra wherein this Court stated "The ship-owners were callous in their attitude and failed to provide him with the names of witnesses. The default was wilful and persistent."

It should be noted that seaman Cannon, supra was not called as a witness, or identified.

It is apparent that Commander Ronneberg misled the fact-trier and this also misled the Ninth Circuit in their supporting the fact-trier, despite the availability of the statutory chronicle clearly explaining the events surrounding the activity aboard ship at the time of the injury, and revealing the injury

in accordance with the Master's declarations. This in the handwriting of the witness, Ronneberg (App. pp. 60, 67, 68).

Undoubtedly Commander Ronneberg was a victim of owner's requirements, his testimony (Tr. pp. 224, 225) reveals difficulties of obtaining a crew in the Vietnam situation and instructional difficulties. A clue to other requirements of the owner is "During an emergency sealift situation, the merchant marine service is the 'fourth arm of defense.' In this role it is vital that ships sail and move on schedule."* This could well account for the requirement to Ronneberg that the inspection be expedited (App. p. 64).

In view of the official nature of Commander Ronneberg's Chronicle, in his own handwriting, recording daily events, it is apparent that his position at the time of the occurrence varied from his testimony at the trial. Hence, there is an inconsistent position. Under these circumstances, the ship owner defendant took a position previous to trial that was contrary at the trial, this taken with the denial of the Master's documentary declarations, then, is the basis for applying the rule in *Pekelis* v. *Transcontinental & Western, Inc.* (2 Cir.) 187 F.2d 122, *cert. den.* 341 U.S. 951, "The position that a party takes prior to trial is probative of that issue when denied at the trial."

It should not be necessary to support the sanctity

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* MANPOWER AND THE MERCHANT MARINE article July, 1970. Proceedings United States Naval Institute, page 28.

of the oath, by citations to this Court. The oath is one of the basic precepts of our society and without that sanctity our system of jurisprudence will fail. The misstatements of Commander Ronneberg are so apparent, leading to the exoneration of the shipowner, that it would appear the traditional obligations to his service and oath were compromised by requirements which he was unable to resist. The circumstances suggest this conclusion.*

A. The Master is Lord of his world; and his ships' papers and records are sacrasanct as against the vessel.

This, a fundamental principle that has spanned centuries, is that the Master is Master; and the owner—even if he were permitted on the bridge—would have no right to dispute his determination. All obligations, rights, duties and responsibilities revolve around his judgment and his person. He may designate duties, but ultimately, the responsibility, in the time honored tradition of the sea, is his. There is no one above him.

He exercises paternal responsibilities to members of his crew and this has been his responsibility since the days of Oleron. See *Mroz* v. *Dravo Corp.* (D.C. Pa. 1968), 203 F. Supp. 499. Gilmore and Black, supra, page 257, characterize: "The seaman as endowed with invincible ignorance." The same philosophy was explained by this Court in *Robertson* v. *Baldwin*,

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* Commander Ronneberg, United States Coast Guard died by own hand November 23, 1969, Seattle, King County, Washington, Certificate No. 9165.

165 U.S. 275, that seamen need protection in the same manner as minors and wards.

With these truisms in mind the role of the Master should not be ignored, and as a person of revered responsibility even to the extent of criminal liability he may not rely on authoritative certification of others.

In *U. S.* v. *Van Shaick* (2 Cir. 1908), 159 F. 847 (Str. Slocum), certification by government authority was no bulkhead to separating him from criminal responsibility. In that case, the vessel was appropriately certified in all respects. A month later with a large passenger list aboard, the boiler exploded, about 900 persons lost their lives. Subsequent inspection revealed the life preservers were faulty. This caused many deaths. The certificate foundered along with the vessel and the passengers. The Master was liable. The result is that knowledge of the Master not only means personal cognizance but he is charged with the obtaining of knowledge of which the owner is bound to avail himself. See *Avera* v. *Florida Towing Co.* (C.A. Fla. 1963), 322 F.2d 155.

It is apparent the Master of the instant vessel was satisfying himself, despite the questionable certification of others that his vessel was in fact safe for navigation, to the extent of seeing that provisions were in the lifeboats. This is a presailing requirement (CG 94.20-5(b) (App. p. 54).

His role includes the making of declarations, reports, log keeping, statutory or otherwise. When these

declarations are made by or under his authority, they are binding as against the owners within the chain of his command.

In the instant case, he made authoritative reports on prescribed forms, the Log (Ex. 21), Coast Guard Injury Report (Ex. 7, herein, App. pp. 58, 59), Company Report (Ex. 13). Hence, all persons had knowledge, including the Coast Guard.

As Brown, J. (5 Cir. 1957), 247 F.2d 629, held in *Cox* v. *Esso Shipping Co.*: "He is Master in every sense of the word," and sets forth a variety of responsibilities and authority at page 633. He finds much support from Judge Borah, "I take it to be well settled that in admiralty, the Master is the owner and any declarations or admissions made by him are admissible as evidence against him."

He then discusses, as in the instant case, injury reports; the authority was special and precise, having put the Master in command, his owners knew of and were equally bound by authoritative Coast Guard Regulations. His act in executing these reports was then in the most exact sense a duty recognized and imposed on him and is admissible against the principal, citing cases at pages 632-634.

The Ninth Circuit in *The Silver Palm* (1937), 94 F.2d 754, considered a collision case responsibility by examination of the Log. The Court considered this as a document of unquestioned verity. The Court then, as in the instant case, remarked that the defendants

treated the sanctity of the Log most lightly, even to the extent of denying the facts, the defendant not attaching any significance or consequences thereto.

The Court then bottomed their decision on *Bunge* v. *Steamship Utopia* (D.C. S.D. N.Y. 1880), 1 F. 892: "Facts stated in an official log, made and signed by those having knowledge of the facts, must be against the ship, be taken as true, unless a mistake is clearly shown."

Under the "Pandora's Box" situation in the instant case, with all the pressures on the Master, it would indeed be harsh on the injured seaman to require Luttrell specifically to be injured while handling painter and gripes. This would be unreal formalism as indicated in *Cox*, supra at page 633; and as indicated in *Cox*, all that is needed is an authoritative statement, and a predicate is not necessary to support facts therein.

In *Cox*, the admissions were erroneously excluded. In the instant case, the Court simply paid no attention to the documentary declarations. The legal effect on the injured seaman is the same.

Von Redlich in Law of Nations (1937), pages 479-481 discusses the sanctity of ships' papers in Prize Court cases imposed on federal judiciary for enforcement under Constitutional grant and reveals the obligations of the Judge to examine on the basis of the ships' papers initially. Papers not delivered to the Judge forthwith shall not be considered. This would give the parties an opportunity to prevaricate, or

shape new defenses resulting in public mischief. "And if the crew then prevaricates or suppresses important facts, it must be from motives which would materially impair the credibility of their subsequent statements." In the instant case, this salutory rule was overlooked. Who could be a better live swearer than the Chief Officer explaining the conditions aboard ship and the documentary declarations made by the Master and himself. Justice and circumstances of the occasion require this rule be not overlooked by federal judiciary.

This Court adheres to the rule that an entry made in a log, with full knowledge or opportunity for ascertaining the truth must be accepted as the truth when it tells against the party making it. *The Newfoundland*, 176 U.S. 97.

The fact-trier by overlooking the role of the Master, then failed to recognize the sanctified declarations of the Master in the ships' papers, the Appellate Court then compounded error by reliance on fact-trier's jural acts at variance with this Court and other Circuits including the Ninth. This conflict should be resolved.

B. Rules of Law and full purport of Jones Act Legislation require a Court to draw inferences and apply presumptions against a ship-owner denying records and failing to disclose information; otherwise a denial of substantive rights results to an injured seaman.

The decision below raises significant and important problems concerning statutory and policy consid-

erations growing out of failure of the lower court to properly interpret and apply the statutes and guidelines of this Court to this case.

The issue is not whether the Court "can be required to find in favor of plaintiff," but whether the findings on the disclosed evidence can stand the test of fairness, justice and reasonableness and by that standard carry out the intent of Congress. It is axiomatic that where a litigant fails to disclose, and then changes his position from one of fact to a position of convenience, mischief will result.

In view of the fact that plaintiff relied on the authenticity of the statutory declarations made by the Master and supported by the Chief Officer Captain Peterson as a live swearer and as expressed in *Cox*, supra, a predicate is not necessary. It would not appear that the burden should be shifted to prove the truths therein stated. Certainly the right accorded to sue the government would be of little consequence if the government could refuse, deny or conceal records which they are required to have (State secrets excepted).

Coast Guard Regulations do require lifeboat lists (CG 97.15-35(b)(8) and station bills (CG 97.13-5) (App. p. 55). These are records of the vessel (CG 97.07-15; App. p. 54).

In *Hydaburg* v. *Alaska Steamship Co.* (9 Cir. 1968), 404 F.2d 151, a cargo damage action, Judge Chambers affirmed a judgment for plaintiff, where defendants inadvertently flooded the bilge causing

damage to plaintiff's salmon cargo. The fact-trier found unseaworthiness, and drew some inferences against Alaska by failure to bring in a crew member who supervised the connections. Unexplained to the fact-trier, this point is quite serious.

The only explanation offered in the instant case was by defendant's counsel. The records simply were not available.

Kirkpatrick, J. in *O'Neill* v. *U. S.* (D.C. E.D. Pa. 1948), 79 F. Supp. 827, was confronted with a Jones Act litigant injured while aboard ship during war. Defendant failed to respond to interrogatories on the ground of secrecy. The Judge simply entered his order refusing to allow the government to oppose the case.

Admiralty provides full discovery (28 U.S.C.A. Rule 32): *The Hazel* (D.C. N.Y. 1940), 31 F. Supp. 745, that plaintiff is entitled to the names of witnesses. See *The Abu* (D.C. N.Y. 1954), 120 F. Supp. 896. It does not appear that Congress intended to grant substantive rights by way of disclosure, and then frustrated by simply not having the records available! Injustice and untruths are then upheld.

Inferences should have been drawn against the ship owner in failing to identify or call "Joe" the seaman in the boat at the time of the injury, or seaman Cannon who sought to aid Luttrell. The natural result is the inference that the ship owner had something to conceal. This principle was followed in *Southern Cross Steamship Co.* v. *Firips* (4 Cir.

1960), 285 F.2d 651. The Court pointed out that only one officer and one seaman were called as witnesses when others were in the area at the time of the injury.

In the instant case, Wulzan was on the deck below. The facts reveal Sleek was alongside Wulzan. Neither were actual witnesses. "Joe" and Cannon were more closely identified as witnesses but concealed by the ship owner. And as pointed out in *Southern Cross*, supra, "The unexplained failure to call material witnesses raises an inference that such witnesses, if permitted to testify would not support the defense as advanced by respondents." The Court then said, "We think that such an inference in the circumstances of this case was not unjustified" citing *The New York* (1899), 175 U.S. 187, 204.

Judge Sobeloff (4 Cir. 1962), in *Gardner* v. *National Bulk Carriers*, 310 F.2d 284, had the occasion to detail the vessel's defaults, where there was a failure to disclose information in a Jones Act case. The seaman was lost at sea. The absence or concealment of information was of concern to the Court.

The Master's default —virtually complete—is emphasized by another consequence flowing therefrom. It obliterated all possibility of evidence to prove whether a search, if undertaken, would have succeeded or failed. "The respondents offered no acceptable explanation of the Master's conduct."

They sought to justify on the passage of time since the seaman was last seen. In the instant case,

the shipowner had possession of all the facts, immediately, as did Ronneberg.

This can lead only to the conclusion, as expressed by Judge Sobeloff in *Gardner*, that the ship owner had something to conceal.

Judge Sobeloff cited *Cook* v. *Lewis* (1951), Can. Sup. Ct. 830, 832-33 (1952), 1 Dom. L. Rep. 1, 3-4 (1952), holding generally that the culpable actor has set in motion a dangerous force which embraces an injured person and then, in that connection with the circumstances which he must contemplate, to have made it impossible for the victim to obtain substantive rights for security.

Prosser describes this rule as requiring the defendant to "exonerate himself or pay." Prosser, Torts (2nd ed 1955) 207-208, 2310-31.

In absence of the records and concurrent inability to produce in the instant case, in the light of the evidence, it is apparent the ship owner had something to conceal. The Court should have drawn inferences against the ship owner. This was the loss of a substantial right as explained by Judge Sobeloff in *Gardner*, supra.

In the light of numerous expressions of this Court and Court of Appeals "that the seaman is a favored person," the fact-trier should have followed that precept, instead of leaving him in the position of being unable to obtain his substantive rights.

There is no question that this legislation was

made in the spirit of correcting evils. It is remedial and the courts are obligated to interpret with that intent in view. This is consistent with the expressions of this Court in *Aguilar* v. *Standard Oil Co. of N. J.*, 318 U.S. 724; *Isbrandtsen* v. *Johnson*, 343 U.S. 799. In *Aguilar*, supra, this Court held legislation gives no ground for making inferences adverse to the seaman or restrictive of his rights. Rather it furnishes the strongest basis for regarding them broadly when an issue concerning their scope arises, and particularly when it relates to the general character of relief legislation the legislation was intended to secure.

This Court has charted the course, complete with buoys, blinkers and warning lights in the channel of the law and, where the pilots in the lower courts fail to follow this course, then the interests of an injured seaman are beached on the muddy shores, a monument to the pilot entrusted to follow the prescribed course.

The Court should have applied the rule of Res Ipsa Loquitor even though plaintiff attempted to show what happened (see *Furnes, Withy Co.* v. *Carter* (9 Cir. 1960), 281 F.2d 264), which states: "In regard to attempts to prove specifics we think his very failure to convince the trial Judge of any particulars warrants reliance upon res ipsa." This was followed by a supporting Ninth Circuit opinion in *Olsen* v. *States Line* (1967), 378 F.2d 217.

This rule finds support in this Court under liability without fault in *Alaska SS Co.* v. *Petterson*, 347 U.S. 396. In that case a stevedore was injured aboard

ship when a block broke. The fact-trier dismissed the case on theory the item was not a part of the ship's equipment. There was a serious question as to where it came from and the cause of the break questionable. Judge Denman, Ninth Circuit, "assumed" the block came from outside the vessel, and relied on a doctrine similar to that of res ipsa, but somewhat undefined. He relied on *Sieracki*, supra, that a ship owner's duty may not be delegated. This Court affirmed and seemed to indicate approval of the Ninth Circuit doctrine of inferences similar to res ipsa in a brief per curiam decision, citing *Sieracki*, supra and *Pope and Talbot* v. *Hawn*, 346 U.S. 406.

In the instant case, the ship owner failed to produce or reveal witnesses; and also denied the written declarations of the Master.

The rule of law applicable is that where a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not produce or reveal them creates the presumption that the testimony, if produced, would be unfavorable. This is consistent with the expression of this Court in *Graves* v. *U. S.* (1893), 150 U.S. 118.

Hence from the expressions of this Court, and other federal courts, the very failure of fact-trier to draw inferences and presumptions against the ship owner was a denial of substantial rights clearly prejudicing the seaman under remedial legislation, as a ward in admiralty under the protection of this Court.

This Court having set guide lines, these guide lines are entitled to be respected and the concern of this Court is whether those guide lines were respected regarding to drawing of inferences and presumptions by the fact-trier. Such was the fact-trier's obligation. This is clearly within the admonition of Justice Douglas in *Wilkerson* v. *McCarthy*, 336 U.S. 70, 71.

If this decision stands, it will result in the Congressional concerns and mandates of this Court being as effective as a bladeless knife to persons employed in the Maritime industry and their families with legislation designed to prevent the very public mischief as here presented.

The utility of these rules is obvious, and are court mandated for sound judicial navigation. The fact-trier and the appellate court in the instant case has so far departed from the course sanctioned by this Court and so far wandered off course, that this Court is respectfully called upon to exercise its power of supervision in the pilot house.

CONCLUSION

For these reasons and to set right a miscarriage of justice that will adversely affect the rights of all litigants in all maritime cases, Writ of Certiorari should issue to review the judgment and opinion of the 9th Circuit.

Respectfully submitted,

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Counsel for Petitioner

Dated: August 20, 1970
Portland, Oregon

APPENDIX A

OPINIONS OF THE DISTRICT JUDGE

"THE COURT: All right, I am ready to rule in this case, Counsel. I recall all the facts and testimony. My ruling of course must be based on whether or not you have sustained the burden of proof of unseaworthiness. There are two aspects to this case, one, the question of whether or not it is safe to cross from this boat over to the railing; and the other is whether there was adequate supervision and adequate instruction by the officer in charge as to how it should be done, and what Luttrell should do. Another aspect of it is whether or not Luttrell, an ordinary seaman, had been previously properly instructed as to his duties.

Now Luttrell testified he left a call for 5:30 at the Park Avenue Hotel, that some resident of the hotel was going to transport him down to the dock where this ship was moored. But that man who was going to transport him to the dock didn't appear, and therefore he became concerned enough to call a cab so he could get down to the ship.

He testified that he knew the boat drill was scheduled for 8:30 and that he was to report aboard ship at 8:15. Now he came on board with his gear and went to his quarters, and he said he put on his life jacket. Then he went from the main deck to the boat deck, and from the boat deck to his cabin deck. When he arrived at the cabin deck there was a man in this boat stowing supplies. Now up to then, Luttrell hadn't talked to anybody, except to wave to somebody he recognized as he walked past the galley. And why hadn't he talked to anybody? Because he didn't report in

when he was supposed to report in, and he didn't take his station at the time that the signal was given; he wasn't there, so naturally the second mate would have difficulty communicating with Luttrell if Luttrell wasn't around. If Luttrell had been there on time, this probably wouldn't have happened, because he probably would have been instructed as to what his duties were. But he wasn't there, so naturally the second mate couldn't instruct him as to what to do. The second mate was there, but he never saw Luttrell prior to the time of the fall, he knew the second mate was his officer in charge, but he never got there, so he couldn't very well communicate with him.

Now one step further. Luttrell was concerned; I find it to be a fact Luttrell was concerned about the fact that he was late, he so testifed that he was concerned. He said he didn't want to stand around and appear not to be doing anything, so he took it upon himself to crawl into this lifeboat from that rail, and of course, once you get in there, you have to get out. But that was a voluntary thing on his part, the same as if he wanted to climb up the ladder to the stack or crawl around the ship anywhere; he voluntarily crawled in there, nobody instructed him to do that, he did that on his own. Now the reason he did it, as he so testified, 'I didn't want to stand around and look like a damned fool.' If he had been there and had asked the mate what he was supposed to do, he would not have had to crawl in there, because he would have known what to do. But he wanted to get into that lifeboat and look like he was working. So when he got in and saw Joe in there, Joe

said, 'There's nothing for you to do here,' now there is no order to that. Joe doesn't give anybody orders; I think anybody would conclude that the second mate was giving the orders. So that was no order. So Luttrell is in the lifeboat and he still hasn't anything to do, and he still has in mind, as he said, "I didn't want to stand around and look like a damned fool,' so he decides he is going to get out of there, there being nothing for him to do in there, so as he was trying to crawl out of the lifeboat he missed his hold on the rail, fell down, and was severely injured. There is no medical testimony here, so I am just recalling this from my own experience, but there is no doubt in my mind that a fracture at the head of the femur, destroying the blood supply, is a serious injury.

Now the Maritime Commission man says that when these people board these lifeboats, they board them from the boat deck; and as far as the testimony here is concerned, it didn't even entail anybody's getting into the boats, they just raised and lowered them to see that the machinery was in proper order. He volunteered to get in there, and of course when he got in he had to get out.

Now I find further than when a seaman qualifies physically to do the work of a seaman, even if ordered to get in and out of that boat, which he wasn't, could accomplish it by merely taking ordinary precautions. And when you take ordinary precautions in any area of life you avoid the injuries which you sustain when you don't. Everyone has been injured because of a little memory lapse, not watching where they are going, or something of that character, everybody has had that experience. There isn't anything about the rigging

here that has been contended to be unsafe; the only contention here is that the distance was such that it made it difficult to get back and forth. Well, it is difficult to a degree, but it shouldn't be difficult for an ordinary seaman; it might be difficult for a real old man, or a woman, but for an ordinary seaman, that shouldn't be too difficult. But even if it were, he literally asked for it, because he climbed in it, because he was late, he didn't know what to do, and as a result he was in a place he wasn't supposed to be, and when he climbed out he had the misfortune to miss his hold. I don't know how he ever did it, but I certainly can't believe that that boat shifted to the point where it threw him off balance, because that is 9,000 pounds of boat, and the ship itself was not in the ocean, but in the Willamette River. Even if a ship went by, I am sure it wouldn't throw enough wake to disturb noticeably this ship tied up to the dock in the river. What is the speed limit there, do you know?

MR. WOOD: I think it is five miles an hour.

THE COURT: Five miles an hour. Now I just don't conclude that there was any unseaworthiness about this vessel, in view of the testimony here. I find the testimony of the Coast Guard commander credible, with his background and experience, he has no particular axe to grind, he isn't a part of the Maritime Commission, he is an independent investigating agency. The Captain of the vessel is something else again, but I found his testimony to be credible with respect to what transpired. I found that the Coast Guard man went down there and took a look and saw the thing was secured; and if it was secured when he looked, and he came there immediately after, then it must have been secured when Luttrell fell, and there is no question about its being lowered or raised at the time of his fall.

So from all of the testimony that I have heard here, including the testimony of Mr. Luttrell, I find it all to be credible, except for the movement of that boat. I just can't believe there was enough movement of that boat to cause this fall. Just putting it all together, I don't think you have sustained the burden of showing any unseaworthiness of that vessel at the time that this accident occurred. He was just volunteering something that was not required of him, putting him in the category of causing his own injury; nobody asked him to do it, he did it voluntarily.

So on those grounds I would be forced to conclude that any recovery here would be denied.

It is an unfortunate situation where a man is injured, and the fact that this accident happened, but absent a Workmen's Compensation situation, where a man is compensated regardless of fault, I see no other alternative. I can't make an award to him just because he was injured, he has to sustain the burden of proving the vessel unseaworthy.

So that will be the decision of the Court.

There being nothing further, court will be adjourned."

No. 23,645

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN M. LUTTRELL,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

[February 17, 1970]

Appeal from the United States District Court for the District of Oregon

Before: CHAMBERS, JERTBERG and TRASK, Circuit Judges. PER CURIAM:

This case falls in the area where the trial judge, on all of the evidence, could have found in favor of either party. We are certain we cannot find that the court was required to find in favor of plaintiff. Thus, we cannot say the findings, conclusions and decree (judgment order) are clearly erroneous.

Decree affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN M. LUTTRELL,

Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

No. 23,645

ORDER DENYING PETITION FOR REHEARING

Before: CHAMBERS, JERTBERG and TRASK, Circuit Judges.

The petition of appellant for a rehearing is denied.

All circuit judges have been advised of appellant's suggestion for rehearing en banc, and none has voted for a rehearing en banc. Therefore, the suggestion for rehearing en banc is rejected.

APPENDIX B

STATUTES APPLICABLE

The constitutional provision involved is:

The United States Constitution, Article 3, Section 2:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; To all Cases of Admiralty and maritime Jurisdiction.

The statutes involved are:

> Public Law 695 of June 19, 1948 (c) 506, 62 Stat. 496; 46 U.S. Code, Section 740, (Public Vessel's Act).
>
> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property, caused by a vessel on navigable water; notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water:
>
> *Provided*, that as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessel's Act or Suits in Admiralty Act, as appropriate, shall con-

stitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act:

Provided further, that no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage."

APPENDIX C

TITLE 46 U.S.C.A. SECTION 688
JONES ACT

Section 688. *Recovery for injury to or death of Seaman.*

"Any Seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007.

Section 51: *The Federal Employers' Liability Act, 35 Stat. 65; 45 U.S.C.A.*

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations shall be liable in damages to any carrier in such commerce, . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or in-

sufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The Federal Employers' Liability Act, 35 Stat. 66, 45 U.S.C.A. 54:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries, to or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

APPENDIX D

RULES AND REGULATIONS FOR CARGO AND MISCELLANEOUS VESSELS

Sub-chapter 1, (Title 46 C.F.R., Parts 90 to 98 Inclusive). C. G. 257. January 3, 1966.

United States Coast Guard Treasury Department. Signed by Commandant, United States Coast Guard, 90.01 et seq.:

> "Provides generally the authority and purpose of regulations affecting the merchant marine. The regulations are necessary to carry out the provisions of law affecting cargo and miscellaneous vessels and such regulations have the force of law."

90.01-10 (a) (1):

> "The authority to prescribe regulations generally is set forth in 46 USC section 372, the Commandant U. S. Coast Guard, superintends the administration of vessel inspection laws and is required to produce a correct and uniform administration of the inspection laws, rules and regulations."

90.01-10 (e):

> "The regulations regarding lifesaving equipment of cargo and miscellaneous vessels interpret or apply 46 USC sections 363, 367, 391, 404, 481, and 526 p. and 50 USC section 198."

91.30-1 (a):

> "Inspection after accident: A survey, either

general or partial, according to the circumstances shall be made every time an accident occurs which affects the safety of the vessel or the efficiency or completeness of its life saving appliances or other equipment. . . ."

92.25-5:

"Rails and Guards: Rails at least 36 inches high or equivalent protection shall be installed near the periphery of all weather decks accessible to persons on board."

94.15-10 (b) (2):

"Suitable access to the lifeboats shall be provided to enable the crew to prepare the lifeboats for launching."

94.20-5 (b):

"Equipment for LIFE boats: 'Lifeboats . . . shall be fully equipped before the vessel is navigated. . . .'"

97.01, 97.03-1:

"Operations: Provides for statutory penalties for the violation of marine safety statutes."

97.07:

"Provides for reports of casualty, to the Coast Guard, in writing."

97.07-15:

"The owner, agent, master or other person in charge of any vessel involved in a marine casualty shall retain such voyage records as are maintained by the vessel. . . ."

97.13-5:

"Station Bill: Masters' responsibility: "A station bill (muster list) shall be prepared by the master of the vessel who shall be responsible to sign such station bill and to ascertain that it is duly posted in conspicuous locations in the vessel, particularly in the crew quarters, before the vessel sails."

97.13-10:

Duties of crew: "The station bill shall set forth the special duties and duty station of each member of the crew for the various emergencies." This includes "the preparation and launching of lifeboats."

97.13-20:

Master to instruct crew: "The master shall conduct such drills and give such instructions as are necessary to insure that all hands are familiar with their duties as specified in the station bill."

97.14:

Manning of Lifeboats: Persons in command of lifeboat: "For vessels in ocean service, the master shall appoint a first and second in command of each lifeboat, who shall be either a licensed deck officer, an able seaman or a certified lifeboatman."

97.15-5 (c):

"The person in charge of each lifeboat shall have a list of its crew, and shall see that the persons under his orders are acquainted with their several duties."

97.15-35:

Fire and boat drills. "The master shall be responsible for conducting a fire and boat drill at least once in every week. The scheduling of such drills shall be at the discretion of the master except that at least one fire and boat drill shall be held within 24 hours of leaving port if more than 25 percent of the crew have been replaced at that port."

97.15-35 (b):

"The fire and boat drill shall be conducted as if an actual emergency existed. All hands should report to their respective stations and be prepared to perform their respective duties specified in the station bill."

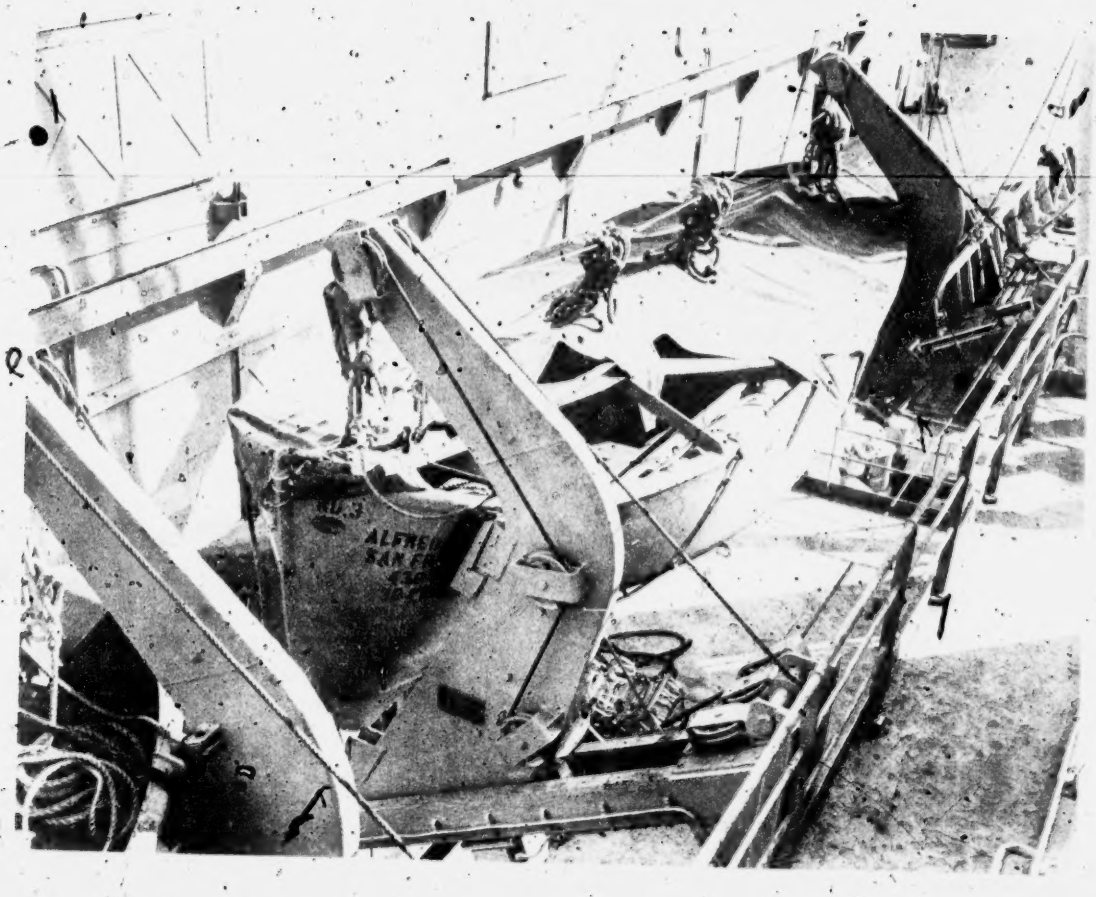
97.15-35 (b) (4):

"Weather permitting, the lifeboat covers and strongbacks shall be removed, plugs or caps put in place, boat ladders secured in position, painters led forward and tended, . . ."

97.13-35 (d):

"A copy of these requirements shall, Form CG 809, shall be framed under glass and posted in a conspicuous place about the vessel."

APPENDIX E



APPENDIX F

REPORT OF PERSONAL INJURY OR LOSS OF LIFE

INSTRUCTIONS

1. [illegible] completed for every loss of life [illegible] which incapacitates the injured [illegible] excess of seventy-two hours (3 days). [illegible] gives any vessel except those [illegible] Federal Boating Act.

2. [illegible] to [illegible] person or harbor workers are not [illegible] unless the injury arises out [illegible] of [illegible] of use of [illegible] equipment, a vessel casualty, [illegible] presence of ship's personnel of the [illegible] casualty.

3. A [illegible] and two signed copies shall be [illegible] submitted [illegible] station possible to the Officer in [illegible] Inspection, U. S. Coast Guard, in [illegible] whose district the accident occurred or in whose district the vessel first arrive(s)(d) after such casualty.

4. The master or person in charge is required to report in person to the Officer in Charge, Marine Inspection as soon as possible after the casualty occurs unless it can be shown that it was inconvenient to do so because of the distance involved. However, nothing shall relieve the person in charge of the vessel from submitting this report.

5. This report should be completed in full. Blocks which do not apply to a particular case should be indicated as "NA". Where answers are unknown or none, they should be indicated as such.

6. Report all vessel casualties or accidents on Form CG-2692, Report of Vessel Casualty or Accident. Attach to Form CG-924E to the CG-2692 for each person killed, missing or injured as a result of the marine casualty or accident.

Officer in Charge, Marine Inspection, Port of: Portland, Oregon — Date submitted: 14 Sept. 1956

I. PARTICULARS OF VESSEL

(a) Name of vessel: [illegible]	(b) Official number: 247732	(c) Vessel inspected (Yes/No): Yes	(d) Nationality: USA
(e) Type of vessel: [illegible]	(f) Propulsion (Steam, diesel, etc.): Steam	(g) Owner, operator or agent (Indicate which): U.S.A. - MARAD; J.J. Tennant Co., G.A.	
(h) Vessel in charge (Indicate which): [illegible] to Lacaux - Master		(i) Licensed by Coast Guard: X Yes / No	

II. PARTICULARS OF PERSON INJURED, DECEASED OR MISSING (Indicate which)

(a) Name of person: John [illegible] Carroll		(b) Home address: 400 Seaside Ave., Honolulu, Hawaii	(c) Injured, deceased or missing: Not Recorded
(d) Age or date of birth: 7-Sep-70 - 01	(e) Licensed by Coast Guard: Yes / X No	(f) Status or capacity on vessel: Ordinary Seaman	
(g) Activity engaged in at time of casualty: Securing [illegible] lifeboat, during Boat Drill		(h) If crew member or shore worker: X On watch / X Working / Other	
(i) (a) Name of supervisor at time of casualty: William S[illegible]		(b) Supervisor's capacity or status on vessel: 2nd. Mate	

III. PARTICULARS OF ACCIDENT OR CASUALTY

16. Date of casualty: 14 Sept. 1[illegible]	17. Time of casualty (Local or zone): 0855 Hrs.	18. Zone description: US Pacific Coast	19. Time of day: X Day / Night / Twilight
20. (a) Did casualty occur while underway? Yes / X No	(b) If yes, last port of departure: N/A	(c) If yes, where bound when casualty occurred: N/A	
21. (a) Vessel location at time of casualty (Latitude and longitude, distance and TRUE bearing from charted objects, such as anchorage, etc.): [illegible]ttl[illegible] & Steel Docks [illegible] Str., Portland Oregon		(b) Body of water (Geographical name): Willamette River	
22. (a) Casualty: X Injury / Death / Missing (Complete INJURY or DEATH entries below, as appropriate)			
(b) Nature of injury: Sent to Hospital for examination. Not determined aboard vessel. Hip broken [illegible]		(c) Total days in hospital: Beginning 2[illegible]	
(d) Reason for death: N/A		(e) Location of body at time of death: N/A	
		(f) Date of death: N/A	

(Over)

EXHIBIT

1966: Boat drill being held. December 13 [illegible], [illegible] securing [illegible] and clearing gripping-in gear, [illegible] completing routine duties in life boat, stepped on [illegible] fell, intending to leave boat for cabin deck, slipped [illegible] at deck (approximate distance of fall was 12 feet). Boat to [illegible] leg broken by falling on seaman George W. Wilson, A.B., but himself landed safely on the boat deck fwd on #3 boat.

WITNESSES TO ACCIDENT (At least two, if possible)	
NAME: William A. Sloek, 2nd. Mate	NAME
ADDRESS: 224, [illegible]rth Garrison Rd. Vancouver, Wash.	ADDRESS
NAME: No other witnesses to report.	NAME
ADDRESS	ADDRESS

IV. ASSISTANCE AND RECOMMENDATIONS

(a) WERE MESSAGES SENT	(b) IF YES, GIVE DATE OF FIRST MESSAGE	(c) IF YES, GIVE TIME OF FIRST MESSAGE (Local or zone and description)
☐ YES ☒ NO	N/A	N/A

26(a) TREATMENT ADMINISTERED	(b) IF YES, BY WHOM	
☒ YES ☐ NO	☐ SHIP'S DOCTOR ☒ OTHER SHIP'S PERSONNEL ☒ OTHER (Specify)	Removed to Hospital for treatment.

27 BRIEFLY DESCRIBE TREATMENT (If administered by other than M. D.)

Removed to hospital for treatment. Prior to removal from vessel, first aid was administered by WSSC attendant on the vessel very shortly after accident.

28(a) NAME OF HOSPITAL (If person was hospitalized)	(b) ADDRESS OF HOSPITAL
Physicians and Surgeons Hospital	North West 19th. and Lovejoy Sts. Portland, Oregon

29 RECOMMENDATION FOR CORRECTIVE SAFETY MEASURES PERTINENT TO THIS CASUALTY

None.

TITLE	SIGNATURE
Master	

CPO 911805

EXHIBIT 7

APPENDIX G

A. LIFESAVING EQUIPMENT

LIFEBOATS AND WORKBOATS - STARBOARD

BOAT NO.	BUILDER	BUILDER'S NUMBER	MATERIAL	TYPE	LENGTH	CAP. CU. FT.	AIRTANK CAP. CU. FT.	PER. CONS.	DATE BUILT
PORT									
3	Welin	E 13145	Steel	Motor	24	436	82.4	36	1944
4	Welin	C 13166	Steel	OAR	24	436	68	40	1944

#204. Kw

Certified to be a true copy of Pages 3 & 4 of Hull Inspection Book, List of Equipment CG-840AA dated 9-13-66 for S/S ALFRED VICTORY, O.N. 247 732.

JOHN A. CORSO, CDR, USCG

3

BOAT DAVITS

BOAT NO.	NO. OF SETS	BOAT NO.	TYPE	BOAT NO.	MANUFACTURER
	4		Gravity		Welin
	SERIAL NOS.		SERIAL NOS.		SERIAL NOS.
1	D-133 L				
1	D-133 R				
2	D-75-R				
2	D-75 L				
3	D54L				
3	D-54 R				
4	D-126 R				
4	D-126 L				

WINCHES

BOAT NO.	NUMBER	BOAT NO.	TYPE	BOAT NO.	MANUFACTURER
	4		C V R		Welin
	SERIAL NOS.		SERIAL NOS.		SERIAL NOS.
1	V375 L				
2	V375 R				
3	V376 R				
4	V377 L				

H. ACCOMMODATIONS AND OTHER SPACES

1. [X] Hospital and first aid equipment
2. ~~[ ] Operating room explosion proof~~ N/A
3. [X] Accommodations and storerooms
   - Size
   - Ventilation
   - Lighting and wiring
   - Heating
   - Sanitation
   - Screens
   - Insulation
   - Fire retardant
   - Galley equipment
   - Required alarms and locks

I. EMERGENCY DRILLS

1. [X] Drills were required
2. Date held 14 Sept 1966
3. Boat drill:
   - Number on the boats swung out 1, 2, 3, 4
   - Number on the boats lowered to water 2 & 4
   - Number of crew exercised in boats 15
4. [X] Fire drill held
5. Detailed remarks on drills:

Satisfactory drills and instructions.

See page 41 regarding possible injuries to crewman during drill

Certified to be a true and correct copy of page 20 of CG-840A, Hull Inspection Book, dated 9-13-66 for the S.S ALFRED VICTORY.

Alice M. Lohr

ALICE M. LOHR, Clerk
U.S. Coast Guard Marine Inspection
Portland, Oregon

Visco 10 August 1966

Port of Oyster

Examined all 4 lifeboat davits have been stripped. Examined lifeboat davit (removed for sealing and overhaul of rollers & ratchets). Vessel replenished drydock completed at Savannah this date.

0900-1100

Port Steward

Certified to be a true copy of Page 33 of Hull Inspection Book, CG-840A dated 9-13-66 for S/S ALERED VICTORY, O.N. 247 732.

JOHN A. CORSO, CDR, USCG

Wed 31 August 1966

With John E. Lynn

Tested steam smothering systems began

test of bilge pumping system

1000 - 1600

Bert Stromberg

Wed 7 Sept 1966

Completed test of

bilge pumping system.

Tested anchor windlass

& ground tackle. Witness

weight list of LBs

and davits - including

checking electric controls

& limit switches.

37 1300 - 1530

Bert Stromberg

Certified to be a true copy of Page 37
of Hull Inspection Book, CG-840A dated
9-13-66 for S/S ALFRED VICTORY, O.N. 247 732.

JOHN A. CORSO, CDR, USCG

Wilmington 9 September 1966.

Continued Examination (with John F. Lynn). Tested new installation of sudden indicator. Examined & stamped new life preservers. Issued list of remaining items to be corrected prior to certification. Owners this date revised application, & request USCG vs ABS issuance of International Safety Construction Certificate.

38 1300-1600

Betty J. Kennedy

Certified to be a true copy of Pages 38 and 39 of Hull Inspection Book, CG-840A dated 9-13-66 for S/S ALFRED VICTORY, O.N. 247 732.

JOHN A. GORSO, CDR, USCG

Mikes 13 Sept 1960
Initiate 1410

Completion of all items of inspection including checking correction of deficiencies noted to date.

Certificate of inspection to be delivered AM 14 Sept on completion of satisfactory fire & boat drill.

1500 - 1600

Bathy Y Pennington

Nice 14 Sept 1966
Port of Orio M.O
Victory
with safety gear &
boat drill =
Issued to master
(Temporary)
Certificate of Inspection
Safety Equip Cert.
Safety Const Cert.
Safe Radio Cert.
ONE (1) certificate
item per CG 841
attached (Protective
Covers)
Inspection and
certificate dated
13 Sept 1966
0815 - 0945
Betty J. Kennedy

Certified to be a true copy of Pages 40 and 41 of Hull Inspection Book, CG-840A dated 9-13-66 for S/S (ALFRED VICTORY, O.N. 247 732.

JOHN A. GORSO, CDR, USCG

at approx 0855
During fire & boat
drill on 14 Sept 1966,
ordinary seaman
John LUTTRELL
was ~~reported~~ reported as having
slipped and fell
from the port
gunwale of No 3
lifeboat to the
boat deck while
securing the boat
on its stowed
position. William
Sleek 2nd mate
observed the incident
while supervising
No 3 lifeboat

are

operations. LUTTRELL was given first aid attention by WISCO Medical personnel and taken to the hospital by ambulance for observation & treatment of unknown injuries. The master was furnished injury report forms to be mailed at first opportunity. The vessel sailed at 1000 after completion of drill.

Bethel J. Bromley

42

Certified to be a true copy of Page 42 of Hull Inspection Book, CG-840A dated 9-13-66 for S/S ALFRED VICTORY, O.N. 247 732.

JOHN A. CORSO, CDR, USCG

Record of Inspection

Name and title of representatives of the vessel assisting in the inspection:

Jack Christian (Mate/Mine)

Charlie Still (ABs)

Micky Tregaskoff

~~Hall Linder~~ (Sent Engr.)

Don Kinzer (WISCO)

Hal F. De LASAUX (Master)

In my opinion the vessel

[X] is

[ ] is not

fit for the service and route specified.

Bertram J. Rommberg

(1) Signature of U. S. C. G. Inspector

(2) Signature of U. S. C. G. Inspector

Certified to be a true copy of Page 48 of Hull Inspection Book, CG-840A dated 9-13-66 for S/S ALFRED VICTORY, O.N. 247 732.

JOHN A. MORSO, CDR, USCG

☆ U.S. GOVERNMENT PRINTING OFFICE: 1961 — 584544

WELIN METALLIC LIFEBOATS

DESIGN DATA

OAR PROPELLED LIFEBOATS

22 Foot TO 28 Foot

A-LENGTH	B-BEAM	C-DEPTH	D-LIFTING CENTERS	CUBIC CAPACITY	PERSONS (max.)	WT. OF BARE BOAT-STEEL	WT. OF BARE BOAT-ALUM.	WT. OF EQUIPMENT	WT. OF BOAT & EQUIPMENT STEEL	WT. OF BOAT & EQUIPMENT ALUM.	TOTAL LOWERING WEIGHT (STEEL)	TOTAL LOWERING WEIGHT (ALUM.)
22	6.75	2.92	20.33	250	25	2441	1515	643	3084	2158	7209	6283
22	7.5	3.17	20.25	310	31	2814	1592	767	3581	2359	8696	7474
24	7.00	3.00	21.00	302	30	Note 6	2200	739		2939		7889
24	7.75	3.33	22.25	370	37	3307	2206	822	4129	3028	10234	9133
24	8.00	3.58	22.25	400	40	3325	2185	850	4175	3035	10775	9635
26	7.88	3.35	22.50	410	41	3740	2107	779	4519	2886	11284	9651
26	8.38	3.6	22.50	460	46	4053	2594	929	4982	3523	12572	11113
26	9.00	3.83	22.50	530	53	4340	Note 6	997	5337		14082	
28	9.00	3.96	24.00	590	59	5625	3332	1072	6697	4404	16432	14139

SUPREME COURT, U. S.

No. 581

Supreme Court, U.S.
FILED
SEP 28 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

JOHN M. LOTTERELL, PETITIONER

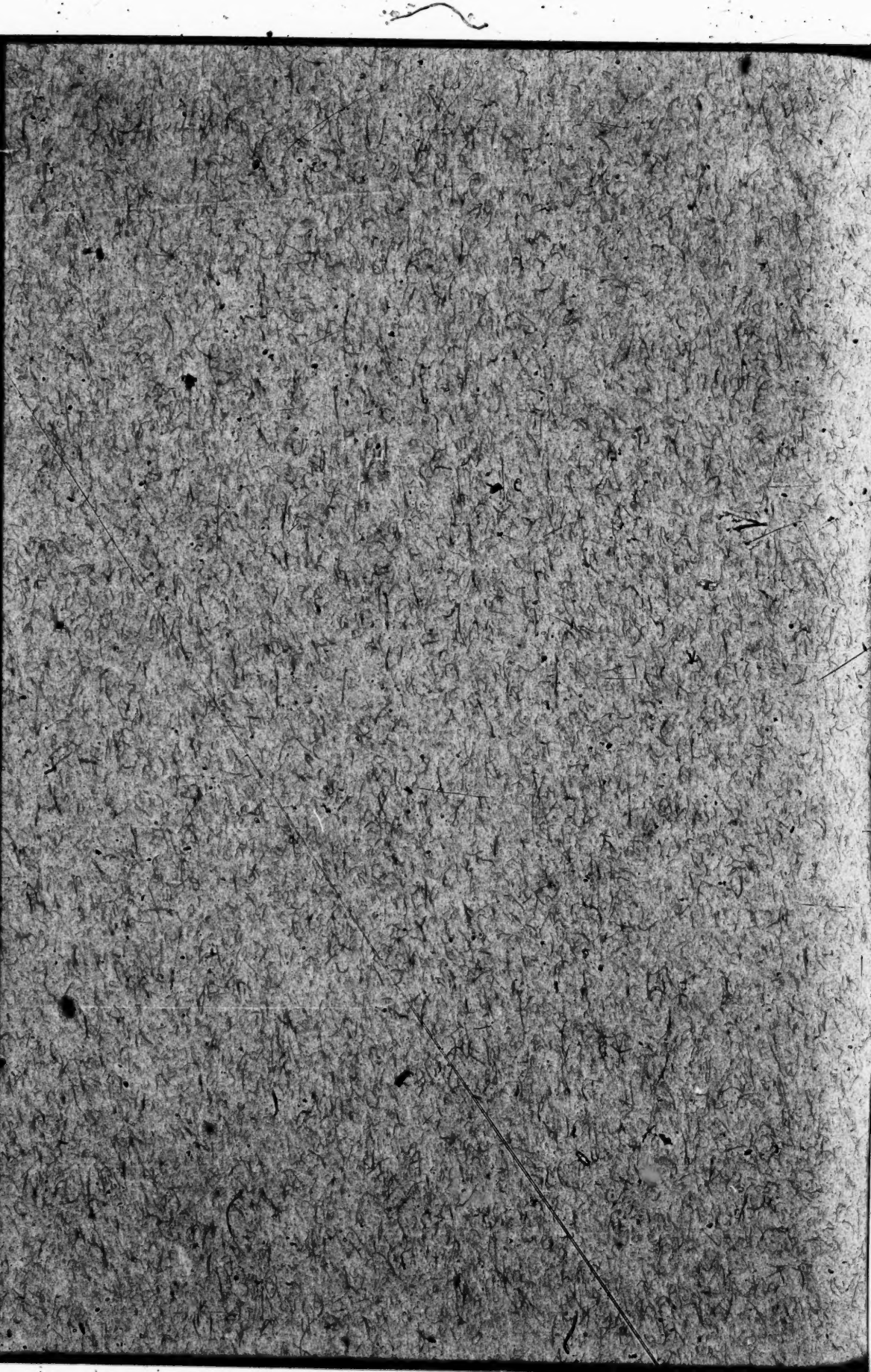
v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 587

JOHN M. LUTTRELL, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We invite the Court's attention to the following facts which demonstrate that the petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on February 17, 1970. A petition for rehearing was filed on May 4, 1970,* and denied on May 21, 1970. The petition

* The petition for rehearing apparently also was untimely filed. On March 6, 1970, 17 days after the entry of judgment, petitioner obtained an extension of time to April 10, 1970.

for a writ of certiorari was filed on August 24, 1970, 95 days after the denial of that petition for rehearing, and no extension of time for petitioning was obtained.

Since the petition was not filed within the 90-day time limit of 28 U.S.C. 2101(c), and since that limit is jurisdictional, the petition for a writ of certiorari should be denied as untimely.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

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within which to file a petition for rehearing. This time was further extended by the court of appeals to May 1, 1970. However, the petition for rehearing was not filed until May 4, 1970, three days after the last extension of time had expired.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 403979 181

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 5 1970
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In the Supreme Court
of the United States

OCTOBER TERM, 1970

No. 587

JOHN M. LUTTRELL,

Petitioner,

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner's Reply Memorandum to the Memorandum of The United States in Opposition

ADELBERT G. CLOSTERMANN
639 Park-Haviland Hotel
Portland, Oregon 97205
Attorney for Petitioner

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-70

In the Supreme Court

of the United States

OCTOBER TERM, 1970

No. 587

JOHN M. LUTTRELL,

Petitioner,

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner's Reply Memorandum to the Memorandum of The United States in Opposition

That this Court does have jurisdiction is evidenced by the facts and the record.

The time limitation of August 22, 1970 (Saturday) for the filing of the Petition for Writ of Certiorari was concurrent with and coincided with the July 17th, 1970 Order Staying Issuance of the Mandate set by The Honorable Richard Chambers, Chief Judge, United States Circuit Court of Appeals, Ninth Circuit, herein reproduced at end of this memorandum.

The petition was mailed on August 21, 1970 in Portland, Oregon as evidenced by the certificate of service by mail on the original thereof, properly addressed with prepaid airmail postage to the Clerk, Supreme Court of The United States, with copies thereof in accordance with rules properly addressed to the Solicitor General of the United States, Washington, D.C., in sufficient time to be received in due course of mail in Washington, D.C., on August 22, 1970.

Respondent's foot note references to untimely* fil-

The February 17th, 1970 opinion of the Ninth Circuit was received in the office of counsel while he was attending military meetings in Washington, D. C., returning on March 3, 1970. Counsel is in individual general practice attorney and on return began preparation of a Motion for Rehearing. Because of the absence from the office a timely motion was made to the Court and granted, extending time for filing thereof until April 1, 1970. During this time period counsel was informed of the recent suicide of respondent's primary witness (see pp. 28, 29, 30 of Petition) Coast Guard Commander Ronneberg. Shortly thereafter, his mis-statements of fact on which the fact-trier substantially relied exonerating the shipowner in this Admiralty case were revealed in an exhaustive investigation, documented and confirmed (see Petition pp. 28, 29, 30).

Thereupon, and by reasons of the disclosures, and the serious challenge to the credibility of said witness, counsel enlisted the assistance and counselling of a colleague in the preparation of the Motion for Rehearing due April 1, 1970.

While this motion was being researched and drafted, counsel's assisting colleague was the victim of a coronary attack disabling him. Based on the disability of the colleague, an extension of time was granted by the Court to allow for his convalescence and subsequent assistance and counselling. That Motion was timely filed as evidenced by the affidavit of service and filing by mail on respondent's counsel dated May 1, 1970 and certificate of the Clerk, Court of Appeals on the record. Counsel has never been in default, nor were filings untimely made and judgment has never been entered. Judge Chambers' order herein attests to the time requirement of the petition in this Court.

ings by petitioner in the Circuit Court of Appeals do not coincide with the attesting certificate of the Clerk of the said Court in the transmittal of the Record to the Clerk of the Supreme Court as to verity of the Record and hence must be rejected as not being factually supported.

All filings made in the Circuit Court of Appeals were timely and were made in accordance with Appellate Rule 25 (c) providing for service on opposing counsel and filing by mail. This is substantiated by certificate of service and filing thereof by mail on all original documents made by counsel.

That counsel has never been in default is evidenced by the record and this is supported by the record of Court of Appeals, Ninth Circuit.

Based on the foregoing timely filing herein by mail and in compliance with the Order of Judge Chambers, and in the interests of justice to an Admiralty ward of this Court, respondent's motion by way of their Memorandum should be denied.

Respectfully submitted,

ADELBERT G. CLOSTERMANN,
Counsel for Petitioner,
639 Park-Haviland Hotel,
Portland, Oregon 97205

United States Court of Appeals

FOR THE NINTH CIRCUIT

FILED

JUL 22 1970

WM. B. LUCK, CLERK

JOHN M. LUTTRELL,
Plaintiff-Appellant

-vs-

UNITED STATES OF AMERICA,
Defendant-Appellee

No. 23645

ORDER STAYING ISSUANCE OF MANDATE

Upon application of ADELBERT G. CLOSTERMANN counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before AUGUST 22, 1970

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Richard H. Chambers

United States Circuit Judge.

DATED: SAN FRANCISCO, CALIF.
JULY 17, 1970

FORM NO. 14